INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of error to be urged	12
Summary of argument	12
Argument:	
I. The arrests were lawful	16
II. Since the arrests were lawful, search of the premises where they were made was lawful; and the search made was not unreasonable	18
Conclusion	43
Appendix A	45
Appendix B	47

CITATIONS

Cases:

Adams v. *New York*, 192 U. S. 585 ..... 18, 20
Agnello v. *United States*, 269 U. S. 20 ..... 26, 29
Argetakis v. *State*, 24 Ariz. 599 ..... 20, 40
Ash v. *United States*, 299 Fed. 277 18
Banks v. *Farwell*, 21 Pick. (Mass.) 156 ..... 18, 38, 39
Boyd v. *United States*, 116 U. S. 616 ..... 18, 19, 20, 22, 36
Brady v. *United States*, 300 Fed. 540, certiorari denied, 266 U. S. 620 17
Carmichael v. *McCowen*, Newfoundland 597 ..... 19, 25, 40
Carroll v. *United States*, 267 U. S. 132 ..... 17, 25, 29, 35
Closson v. *Morrison*, 47 N. H. 482 18
Commonwealth v. *Grasse*, 80 Pa. Super. Ct. 480 21
Commonwealth v. *Phillips*, 224 Ky. 117 ..... 21, 40
Commonwealth v. *Stubler*, 84 Pa. Super. Ct. 32 ..... 39, 40
Dillon v. *O'Brien and Davis*, 16 Cox. C. C. 245 ..... 13, 18, 21, 22, 24, 25, 32, 37, 38, 39, 40
Entick v. *Carrington*, 19 How. St. Tr. 1029 ..... 15, 19, 22, 36, 38
Getchell v. *Page*, 103 Me. 387 ..... 19, 39

Cases—Continued.

	Page
Go-Bart Co. v. *United States*, 282 U. S. 344	14, 29, 30–31, 32, 33, 34, 35, 42
Hails v. *Gardner*, 82 Fla. 355	20
Hale v. *Henkel*, 201 U. S. 43	20
Houghton v. *Bachman*, 47 Barb. (N. Y.) 388	18
Jenkins v. *State*, 4 Ga. App. 859	20
Kneeland v. *Connolly*, 70 Ga. 424	19
Lambert v. *United States*, 282 Fed. 413	18
Marron v. *United States*, 275 U. S. 192	13, 16, 18, 27, 29, 31, 32, 33, 34, 36, 38, 40, 41, 42
Newman v. *People*, 23 Colo. 300	19
North v. *People*, 139 Ill. 81	19, 38
O'Connor v. *Bucklin*, 59 N. H. 589	18
People v. *Cona*, 180 Mich. 641	21
People v. *Defore*, 242 N. Y. 13	20
Pickett v. *Marcucci's Liquors*, 112 Conn. 169	20, 40
Santo v. *State*, 2 Iowa 165	38
Smith v. *Jerome*, 47 Misc. (N. Y.) 22	21, 39, 40
Smith v. *State*, 299 Pac. (Okla.) 243	21
Spalding v. *Preston*, 21 Vt. 9	18
State v. *Evans*, 145 Wash. 4	21
State v. *Gorman*, 196 Iowa 237	21
State v. *Laundy*, 103 Oreg. 443	21
State v. *Magnano*, 97 Conn. 543	39
State v. *Mausert*, 88 N. J. L. 286	21
State v. *Mullen*, 63 Mont. 50	21
State v. *Myers*, 36 Idaho 396	21
State v. *Rebasti*, 306 Mo. 336	21
State v. *Reynolds*, 101 Conn. 224	18, 20
State v. *Robbins*, 124 Ind. 308	19, 39
State v. *Rudy*, 98 W. Va. 444	21
Thatcher v. *Weeks*, 79 Me. 547	18
United States v. *Lee*, 274 U. S. 559	27
Weeks v. *United States*, 232 U. S. 283	20, 22, 25, 29, 36, 37
West v. *State*, 110 Tex. Cr. App. 290	21
Wiggin v. *State*, 28 Wyo. 480	21
Wilson v. *United States*, 221 U. S. 361	20

Statutes:

National Prohibition Act, c. 85, Title II, 41 Stat. 305, 313, 316—	
Sec. 19 (U. S. C., Title 27, Sec. 31)	2
Sec. 29 (U. S. C., Title 27, Sec. 46)	2

Miscellaneous:

Bishop, Criminal Procedure, 1st ed. (1866), Sec. 668	19
Bishop, New Crim. Procedure, 2d ed. (1913), Sec. 211	21
Madison, Debates in the Federal Convention	49, 50

Miscellaneous—Continued.

	Page
1 Gales, Annals of Congress	50, 51, 52
3 Thorpe, American Charters, pp. 1868, 1891	47, 48
4 Thorpe, American Charters, p. 2456	49
5 Thorpe, American Charters, pp. 2783, 3063	48
6 Thorpe, American Charters, p. 3741	48
7 Thorpe, American Charters, p. 3814	47
Wigmore, Evidence (2d ed.), Secs. 2183, 2184, 2250, 2264	18, 20, 36
Wharton, Criminal Procedure, 10th ed. (1918), Sec. 97	21

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 466

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL M. LEFKOWITZ AND PAULINE PARIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 43) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 56) is reported in 52 F. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 21, 1931. (R. 61.) The petition for certiorari was filed October 16, 1931, and was granted November 30, 1931. (R. 62.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the respondents are entitled to the return of books and papers the search for and seizure of which are alleged to have been illegal, and to the suppression of the evidence obtained by means of the search and seizure.

STATUTES INVOLVED

Section 19 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 313 (U. S. C., Title 27, Sec. 31), provides:

> No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this Act.

Section 29 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 316 (U. S. C., Title 27, Sec. 46), provides in part:

> Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

STATEMENT

This was an application by the respondents for an order directing the suppression of evidence and

the return of books and papers seized on the premises at 1547 Broadway, Room 604, New York City, where the respondent Lefkowitz maintained an office and the respondent Paris was employed as a stenographer. In support of the application the respondents filed affidavits alleging that they had been arrested on the premises in question by Federal officers; that the officers thereupon searched the premises, including the waste-paper baskets and the drawers of desks, and took and carried away certain books, papers, and records, which articles were then in the possession of an Assistant United States Attorney, who had refused a demand for their return; that at no time during the search and seizure did the officers exhibit any warrant of arrest or search warrant; and that the search and seizure were in violation of the deponents' rights under the Fourth and Fifth Amendments. (R. 2–8.)

Affidavits were filed in response. It appears from them and the exhibits that the circumstances leading to the arrests and search and seizure were substantially as follows:[1] In July, 1930, Special Agent Hugo, of the Bureau of Prohibition, was assigned to investigate a report that one Henry Miller, 1547 Broadway, Room 604, New York City, was soliciting orders for intoxicating liquors by mail. Hugo was given several letters addressed by the B. & O. Novelty Company and by Henry Miller to

[1] The facts are stated at length for the purpose of showing that the procedure of the Prohibition Agents before the arrests was in all respects regular.

C. F. Odell, Davenport, Oklahoma, regarding a price list of liquor and requesting orders for liquor. On the bottom of one of these letters, with the letterhead "Henry Miller," was "formerly the B. & O. Novelty." (R. 26.)

Writing from Buffalo, New York, over the signature "Anthony Craig," and representing that he had been referred to Miller by C. F. Odell, Hugo engaged in an extended correspondence with Miller at the business address above mentioned, in the course of which he received price lists of whiskies, brandies, and wines offered by Miller for sale and was advised that he should procure in advance a New York draft covering any order he should send. (R. 26–27.) On October 27, 1930, Hugo wrote Miller, inclosing a New York draft for $55 and ordering one case of Scotch whiskey to be sent immediately. Miller replied under date of October 28, 1930, thanking him for the check and order and advising: "Merchandise leaves to-day." Hugo later obtained from the railway express agency at Buffalo two packages addressed to "Anthony Craig," which contained bottles of Scotch whiskey. (R. 28.)

Hugo then wrote Miller that he had not received the ordered whiskey. Miller replied that he was putting a tracer on the lost shipment and would advise as to the result within a few days. Hugo prepared a letter addressed to Miller introducing one Jose Hernandez and advising that Hernandez

had been authorized by him (Craig) to receive from Miller liquor to replace that alleged to have been lost. Posing as Hernandez, Hugo went to Room 604, 1547 Broadway, New York City, presented the letter to a young lady whom he found there and who he later learned was Pauline Paris, and told her that he was a friend of Anthony Craig and had come to inquire about the delivery of a case of liquor which Craig had paid for but had not received. She informed him that Miller would probably be in the office the next day and suggested that he come back and take the matter up directly with Miller. (R. 28–29.)

Hugo, accompanied by Special Agent Olivera, made two subsequent visits to the premises. He introduced Olivera to Pauline Paris as Manuel Negroni and told her that he desired the case of liquor which was to be delivered to him in place of the one lost in shipment, to be delivered to Negroni. At her suggestion he left an address, in New York City, where the liquor could be sent, and she promised that it would be delivered at any time Negroni would specify. Hugo then remarked that Negroni would like to sell whiskey to his friends and asked whether it would not be possible for Miller to lower his prices so that Negroni could make some profit. She replied that she would arrange a meeting between Miller and Negroni to discuss lower prices for wholesale buying of liquor. She gave Hugo a slip of paper upon

which she had written "Chickering 4-8928" and told him to call that telephone number on January 5, 1931, to arrange a meeting between Negroni and Miller. (R. 29-30.) On January 12, 1931, Hugo received in Buffalo a letter, addressed to Anthony Craig, under letterhead "William Salmon, 1547 Broadway, Room 604, New York City," announcing that, pursuant to his custom of changing his name every year, the writer had changed his name "to the above." The letter was signed "William Salmon, Formerly Henry Miller." (R. 30.)

At various times in January, 1931, before the 12th, Agent Olivera, representing himself as Manuel Negroni, had conversations with Miller with reference to the shipment of liquor to Anthony Craig and future shipments of liquor to him. He arranged with Miller for the shipment to him, as Craig's representative, of liquor to take the place of the lost shipment. The liquor was shipped to an address in the Southern District of New York, and was found by Agent Olivera, who tasted it, to be intoxicating liquor fit for use for beverage purposes. (R. 40.) As late as January 5, 1931, Olivera had seen on the outer door of Room 604 the sign "The Southern Agency, D. M. Lefkowit." (R. 40.)

On January 9, 1931, Olivera called Chickering 4-8928, the number of the telephone in Room 604, and talked to Pauline Paris, who told him that she could receive orders for liquor and asked whether

the "stuff" that he had received was all right. Olivera asked for an appointment with Miller. She said that Miller was not in, but that he could talk to his partner. A man then came to the telephone who also asked whether the "stuff" Olivera had received was all right. In the conversation which followed it was arranged that Olivera should call at Room 604 at 3 o'clock p. m. on January 12, 1931, to see Miller with reference to further orders and delfveries of liquor. (R. 19.)

On January 12, 1931, Agent Olivera appeared before a United States Commissioner and swore to a complaint charging that, commencing on or about June 21, 1930, "and continuing thereafter down to the present time," Henry Miller, "Jane Doe," and others had conspired with each other and with divers other persons, to the deponent unknown, to sell, possess, transport, furnish, deliver, and take orders for intoxicating liquor containing more than one-half of 1 per cent of alcohol by volume and fit and intended for use for beverage purposes, without permits, contrary to the National Prohibition Act. The complaint alleged that it was a part of the conspiracy that the defendants should solicit through the United States mails and by other means, from an office in Room 604, at 1547 Broadway, New York City, where the defendants pretended to do a real-estate business under the name "The Southern Agency—D. M. Lefkowit," orders for intoxicating liquor from divers persons

throughout the United States, and should arrange to have intoxicating liquor sent and delivered by express companies, automobiles, and other carriers to the purchasers of the liquor, to collect money in payment of the liquor, and to share in the proceeds of the illegal scheme. (R. 37–38.) Among the overt acts alleged were the sending of letters by the defendant Miller to C. F. Odell; conversations had with the deponent by the defendants "Jane Doe" and Henry Miller; and the transportation by the defendants of one case of Scotch whiskey on or about January 7, 1931, within the Southern District of New York. (R. 38–39.)

As the source of the information upon which the complaint was based, Olivera averred that he had read letters sent by the B. & O. Novelty Company and by Henry Miller soliciting orders for intoxicating liquor from C. F. Odell, which letters were then in the possession of the deponent and copies thereof annexed to the complaint; that he had read the official reports of, and had talked personally with, Special Agent J. M. Hugo with reference to the correspondence between Hugo, using the name Anthony Craig, and the defendant Henry Miller regarding a shipment of liquor made by Miller to Craig on or about October 28, 1930; that he had examined the photostatic copy of a bank draft sent in payment for such liquor and that the name "Henry Miller" appeared as one of the endorsers of that draft; that the deponent, using the name

Manuel Negroni, had had conversations with the defendants Henry Miller and "Jane Doe" regarding the shipment by Miller to Craig and proposed shipments of liquor by Miller to the deponent; and that the deponent had examined the contents of a shipment delivered within the Southern District of New York pursuant to an arrangement by the deponent with the defendants Henry Miller and "Jane Doe," and had found such shipment to contain intoxicating liquor fit for use for beverage purposes. (R. 39–40.)

Upon the filing of the complaint the United States Commissioner issued a warrant for the arrest of the defendants named therein. (R. 42.) The warrant and a certified copy of the complaint were delivered to Deputy United States Marshal Morgenstern, who proceeded with them in his possession to 1547 Broadway, accompanied by Special Prohibition Agents Olivera, Delmore, Guilfoyle, and Gaughan, who were to identify the persons designated in the complaint and warrant and to assist in making the arrests. (R. 16.) Olivera entered Room 604 in advance of the other officers, ostensibly to keep the appointment he had with Miller for that afternoon. Upon seeing him Miller said, "Come on in," and was leading him into the inner office when the other Agents entered. Olivera pointed out Miller to the deputy marshal, saying, "That is Henry Miller." Morgenstern then informed Miller that he had a warrant for

his arrest and placed him under arrest. Miller gave his name as Dan Lefkowitz. Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to Morgenstern the papers and articles mentioned in the affidavit made by Delmore. (R. 16–17, 19, 20, 23, 32–33.)

After the arrest of Lefkowitz the Special Agents conducted a search of Room 604, which is about 10 feet wide and 20 feet long and is divided by a partition into an outer and inner office. (R. 20, 23–24.) They found in a desk in the outer office the notebooks and papers described in the affidavit of Agent Guilfoyle (R. 24); in a desk in the inner office and in the waste-paper baskets the articles mentioned in the affidavit of Agent Delmore (R. 35); and in a towel cabinet several typewritten sheets containing the names and addresses of numerous persons throughout the United States (R. 25). These articles were seized by the Agents and eventually turned over to Assistant United States Attorney Grant. (R. 10.) No force was used by the officers in conducting the search, nor were the desks or cabinet broken into, as none was locked. (R. 25, 36.) One of the drawers in the desk in the outer office was open part way. (R. 20.)

While the search of Room 604 was in progress a young lady entered and was pointed out by Agent Olivera as the "Jane Doe" referred to in the complaint and warrant of arrest. She was placed

under arrest by Deputy Marshal Morgenstern, to whom she gave her name as Pauline Paris. (R. 17, 19, 24.) At the suggestion of Agent Olivera, she voluntarily typed, and wrote her signature on, the following letter (R. 25):

> ULYSSES GRANT,
>
> *Post Office Bldg., New York City.*
>
> MY DEAR MR. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.
>
> Very truly yours,
>
> J. RAY OLIVER.
>
> (s) PAULINE PARIS.

As stated in the affidavit of Agent Olivera, this letter was procured by him partly with the bona fide intention of facilitating her release on bail and partly to obtain her signature and a sample of her typewriting when using the machine which was in Room 604. (R. 21, 24–25.) Olivera later arranged to have the United States Commissioner remain in his office until the prisoners were brought before him, and they were arraigned and released on bail that evening. (R. 21.)

Following a hearing, the application to suppress, etc., was denied by the District Court (R. 47), which rendered a written opinion (R. 43). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter

written by the respondent Paris, on the ground that the search and seizure were unreasonable. (R. 56.) Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged. (R. 60.) This Court granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 62.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the search of the premises and the seizure of the books and papers were unreasonable within the prohibition of the Fourth Amendment.

SUMMARY OF ARGUMENT

The arrests were lawful (1) because made upon an arrest warrant issued upon probable cause and properly executed by an authorized officer; (2) because the arresting officers had probable cause to believe that the persons arrested had committed a felony; and (3) because such officers had probable cause to believe that those arrested were engaged in the commission of crime when the arrests took place.

The question of the extent of the privilege of arresting officers to search and seize was typically presented, in the early cases, in an action against the arresting officer for an asserted illegal seizure. The general rule was early stated to be that the arresting officer was privileged to search for and seize

articles on the person of the prisoner or otherwise in his possession which were connected with the crime as its fruits, or as the means by which it was committed, or as evidence tending to prove it.

After this Court took the view that evidence secured in violation of the Fourth Amendment is inadmissible under the Fifth Amendment, the question was presented in practically all the State courts in its present typical form, an attempt by the accused to suppress the use as evidence of the articles seized by the arresting officers. Practically all the State courts continued to adhere to the broad rule of the common law already stated, as did the texts.

Dillon v. *O'Brien and Davis,* 16 Cox. C. C. (Ex. Div. Ire.) 245, an early and leading case similar on its facts to the present, shows that the principles crystallized in the Fourth Amendment were not intended to limit the right of search and seizure incident to a lawful arrest. That case and the broad statements in the texts have been cited with approval by this Court in several cases; and in *Marron* v. *United States,* 275 U. S. 192, this Court upheld the seizure without warrant of articles used in the commission of crime as an incident of a lawful arrest, and stated that the privilege of the arresting officers to search extends to all parts of the premises used for the unlawful purpose. Since the premises in the present case were small and obviously within the immediate control of the accused, and since the articles seized were means used to

commit the offense within the rule of the *Marron* case, the search and seizure in the present case were lawful unless they fall within the recent decision of this Court in *Go-Bart Co.* v. *United States*, 282 U. S. 344.

That case held that a search and seizure incident to a lawful arrest may be unreasonable within the Fourth Amendment and that in that case they were. But the present case is lacking in most of the factors the sum of which was regarded by this Court as rendering the search and seizure in that case unreasonable. In the present case crime was being committed in the presence of arresting officer Olivera when he entered; the conspiracy was still on foot; the last overt act mentioned in the complaint had been committed only three days before the arrests; the officers had a valid warrant of arrest; they did not falsely claim to have a search warrant; they did not use force to compel the opening of locked receptacles; and the books and papers were taken from unlocked desk drawers, one of which was open, waste paper baskets, and an unlocked towel cabinet. In all these respects the present case is totally unlike the *Go-Bart* case.

There are two respects in which the present and *Go-Bart* cases are similar—the officers possessed no search warrant and the search they made was of the office generally. We submit that in the present case these facts are insufficient to render the search unreasonable. It can not be the law that arresting officers must have search warrants

in *all* cases in order to justify seizure of instrumentalities of crime within the control of the accused. The decisions of this and most other courts decisively hold the contrary.

Nor, we submit, was the search conducted by the officers in the present case a "general exploratory search" of the kind which the framers of the Constitution intended to prohibit by the Fourth Amendment. The abuse there aimed at was the practice of issuing general warrants without probable cause. The generality prohibited was not primarily the generality of the search actually conducted but the generality of the authority to search without any reasonable basis for belief that crime had been committed. This view is supported by the opinions of this Court and the language and history of the Amendment. Search incident to lawful arrest is a totally different thing. The entry is lawful, and the search pursuant to the arrest is not a general search in the hope of the discovery of evidence of the commission of *some* crime, as was the case in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, but a search for the means used in committing the *particular offense* for which the arrest is made. In such a case the indefeasible right of the individual to be secure in his person and effects yields to the public interest in expediting the prosecution of one reasonably believed to be guilty of a criminal offense.

The court below failed to recognize the distinction between a search under a search warrant and one

incident to arrest. In the former case only articles specifically described in the warrant may be seized, whereas in the latter *any* instrumentality of the crime may be. Such a search is necessarily general in the sense that it is for things the existence of which can not be known until they are found, but that fact has not been regarded by this or most other courts as rendering a search incident to arrest unreasonable.

Most of the articles here seized were instrumentalities of crime within the rule of *Marron* v. *United States*, 275 U. S. 192. The fact that they provide documentary evidence of guilt does not render their seizure illegal.

ARGUMENT

I

THE ARRESTS WERE LAWFUL

The District Court held that the arrests were lawful (R. 44), and the Circuit Court of Appeals said that they were "to be treated as having been made lawfully" (R. 56). For the following reasons the Government submits that the arrests were lawful:

1. The arrests were made by a Deputy United States Marshal upon a warrant of arrest issued by a United States Commissioner and addressed to the United States Marshal or to any of his deputies. (R. 17, 42–43.) The complaint upon which the warrant issued adequately charged a conspiracy to violate the National Prohibition Act (R. 37–39), and was supported by a statement under oath by Special Agent Olivera of facts within his knowledge which were ample to show probable cause for belief that the accused had committed the offense charged (R. 40–41). Before the arrests the respondents Lefkowitz and Paris were identified by Olivera as the Henry Miller and "Jane Doe" named in the complaint and warrant of arrest. (R. 16–17.)

2. The dealings between Agent Olivera and the accused afforded reasonable ground for belief that the persons arrested had committed the felony of conspiring to violate the National Prohibition Act. *Carroll* v. *United States*, 267 U. S. 132, 156, 161; *Brady* v. *United States*, 300 Fed. 540, 543 (C. C. A. 6th), certiorari denied, 266 U. S. 620.

3. Olivera's prior transactions with the accused in Room 604 and the appointment to discuss the sale of liquor with Lefkowitz at about the time of the arrests were ample ground for belief that the conspiracy was still on foot when Olivera, upon entering the room, found Lefkowitz there appar-

ently ready to continue his business dealings and accept orders for liquor in violation of Section 19 of Title II of the National Prohibition Act, *supra*, p. 2. *Marron* v. *United States*, 275 U. S. 192, 198; *Lambert* v. *United States*, 282 Fed. 413, 417 (C. C. A. 9th); *Ash* v. *United States*, 299 Fed. 277, 279 (C. C. A. 4th).

II

SINCE THE ARRESTS WERE LAWFUL, SEARCH OF THE PREMISES WHERE THEY WERE MADE WAS LAWFUL; AND THE SEARCH MADE WAS NOT UNREASONABLE

Until *Boyd* v. *United States*, 116 U. S. 616, it was settled law that the admissibility of evidence was not affected by the illegality of the means by which it was obtained. *State* v. *Reynolds*, 101 Conn. 224, 237; *Adams* v. *New York*, 192 U. S. 585; Wigmore, Evidence (2d ed.), Sec. 2183. Hence the question of the extent of the privilege of an arresting officer to make a search did not arise in connection with the attempted suppression as evidence of the use of the articles seized upon such a search. The typical case presenting the question was an action against the arresting officer for damages for an asserted illegal seizure. *Banks* v. *Farwell*, 21 Pick. 156 (Mass. 1839); *Spalding* v. *Preston*, 21 Vt. 9 (1848); *Houghton* v. *Bachman*, 47 Barb. 388 (Sup. Ct. N. Y. 1866); *Closson* v. *Morrison*, 47 N. H. 482 (1867); *O'Connor* v. *Bucklin*, 59 N. H. 589 (1879); *Dillon* v. *O'Brien and Davis*, 16 Cox. C. C. 245 (Ex. Div. Ire. 1887); *Thatcher* v. *Weeks*, 79 Me. 547.

(1887); *Carmichael* v. *McCowen*, (1897-1903) Newfoundland 597; *Getchell* v. *Page*, 103 Me. 387 (1908); cf. *Kneeland* v. *Connally*, 70 Ga. 424 (1883); *State* v. *Robbins*, 124 Ind. 308, 310–311 (1890); *North* v. *People*, 139 Ill. 81, 107 (1891); *Newman* v. *People*, 23 Colo. 300, 310–311 (1896).

Because of the rule that the admissibility of evidence did not turn on the legality of the means by which it had been obtained, the question whether a search was authorized by the warrant under which it was made arose typically in the same manner. The famous case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, for example, was an action of trespass against officers who had, under a general warrant, entered the plaintiff's premises, arrested him, and searched for and seized his books and papers.

The general rule was early stated to be that upon making a valid arrest the arresting officer was privileged to search for and seize articles connected with the crime either as its fruits, or as the means by which it was committed, or as evidence which would aid in securing a conviction. Such articles might be taken if on the person of the prisoner or otherwise in his possession. Bishop, Criminal Procedure (1st ed. 1866), Sec. 668; cases cited *supra*.

Boyd v. *United States*, *supra*, established that the Fourth and Fifth Amendments must be read together, and that, when so read, their effect was to render inadmissible evidence obtained in violation of the Fourth Amendment. While this doc-

trine is too firmly established in Federal law to be questioned now, its historically questionable basis[2] and its rejection by the great majority of the State courts[3] should not be forgotten when the attempt is made, as it is in the present case, to extend the effect of the Fourth Amendment far beyond its express language and original intent.

After the decision of the *Boyd* case, and especially after its application in *Weeks* v. *United States,* 232 U. S. 283, a number of State courts followed suit, overruling or ignoring their earlier decisions to the effect that evidence was not inadmissible because it had been illegally obtained (Wigmore, *supra,* Sec. 2183, 2184); and in practically all the State courts the question of the extent of the privilege of arresting officers to search and seize was then presented in its present typical form—an attempt by the accused to suppress the use as evidence of articles taken by arresting officers. Practically all the State courts continued to define the privilege according to the broad rule of the common law already stated. *Argetakis* v. *State,* 24 Ariz. 599, 606; *Pickett* v. *Marcucci's Liquors,* 112 Conn. 169, 174; *Haile* v. *Gardner,* 82 Fla. 355, 359–360; *Jenkins* v. *State,* 4 Ga. App. 859, 864;

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[2] See *Hale* v. *Henkel,* 201 U. S. 43, 71–73; *Adams* v. *New York, supra,* 192 U. S. 585, 597–598; Wigmore, *supra,* Sec. 2184, 2250, 2264; cf. *Wilson* v. *United States,* 221 U. S. 361.

[3] See *People* v. *Defore,* 242 N. Y. 13, 21. *State* v. *Reynolds, supra,* 101 Conn. 224, contains an excellent discussion of the bases of the common law rule that admissibility of evidence is not affected by the illegality of the means used in securing it.

State v. *Myers,* 36 Ida. 396, 407; *State* v. *Gorman,* 196 Ia. 237, 239; *Com.* v. *Phillips,* 224 Ky. 117; *People* v. *Cona,* 180 Mich. 641, 652; *State* v. *Rebasti,* 306 Mo. 336, 345; *State* v. *Mullen,* 63 Mont. 50, 61; *State* v. *Mausert,* 88 N. J. L. 286; *Smith* v. *Jerome,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Grasse,* 80 Pa. Super. Ct. 480; *State* v. *Laundy,* 103 Oreg. 443, 496; *Smith* v. *State,* 299 Pac. (Okla. Crim.) 243; *West* v. *State,* 110 Tex. Cr. App. 290; *State* v. *Evans,* 145 Wash. 4, 13; *State* v. *Rudy,* 98 W. Va. 444; *Wiggin* v. *State,* 28 Wyo. 480, 491. So also the texts. Bishop, New Criminal Procedure (2d ed. 1913), Sec. 211; Wharton, Criminal Procedure (10th ed. 1918), Sec. 97.

The early approach to the present problem in a case similar to the present one on its facts is excellently illustrated by the leading case of *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. (Ex. Div. Ire.) 245. There the defendants in an action for damages for an alleged illegal seizure had secured a warrant for the arrest of the plaintiff. They went to his house and entered it to execute the warrant. They found the plaintiff engaged in the conspiracy for which the warrant of arrest had issued. (The same is true in the present case. *Infra* p. 32.) The officers arrested the plaintiff and seized books and papers and a telegram which were being used in furtherance of the conspiracy. The alleged justification for the seizure was that the property so taken was necessary and material evidence in the prosecution of the offense for which the arrest had

been made. The plaintiff relied on *Entick* v. *Carrington,* 19 How. St. Tr. 1029. Since, as this Court has declared,[4] the Fourth Amendment is a crystallization of the principles enunciated by the court in the *Entick* case, it is obvious that the contention of the plaintiff in the *Dillon* case is identical with that of the respondents here. The court in the *Dillon* case gave judgment for the defendants. It said that from the earliest times it had been the settled and unvarying practice to seize proofs of guilt upon making an arrest and give them in evidence at the trial. (P. 248.) Excerpts from the opinion follow (pp. 249–251):

> I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found *in his possession* which will form material evidence in his prosecution for that crime. * * * Its [the rule's] purpose and object, viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * But the interest of the State in the person charged being

[4] *Boyd* v. *United States, supra,* 116 U. S. 616, 626–627, 630; *Weeks* v. *United States, supra,* 232 U. S. 383, 390.

brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I can not see how it can be enforced otherwise than by capture. If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged. * * * This brings me to the only case relied on by the plaintiff: (*Entick* v. *Carrington,* 19 State Trials, 1029, 1063–4.) The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable or probable cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else. The nature of the question there is shown by the statement of Lord Camden that "If this point should be determined in favour of the jurisdiction, the

secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only, and he adds: "All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable that nothing is left either to the discretion or to the humanity of the officer." It was, of course, decided that that warrant was illegal; but the case, as a decision, is not in point here. *The right here claimed is not to take all the plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in Entick* v. *Carrington* (*19 State Trials, 1029*), *upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person.* * * * *For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.* (Italics ours.)

On the authority of *Dillon* v. *O'Brien and Davis*, the Supreme Court of Newfoundland held that, upon making a valid arrest for the crime of arson, the arresting officer was privileged to seize, and

keep possession for three months of, the dwelling house, shop, goods, furniture, and stock which had been set fire to, for use as evidence in the prosecution. The action was trespass and trover by the owner of the house, shop, *et cetera,* against the arresting officer. *Carmichael* v. *McCowen* (1897–1903) Newfoundland 597, *supra.*

The *Dillon* case and the broad statements of the texts have been cited with approval by this Court. In *Weeks* v. *United States, supra,* 232 U. S. 383, 392, it was said:

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, Sec. 211; Wharton, Crim. Plead. and Practice, 8th ed., Sec. 60; *Dillon* v. *O'Brien and Davis,* 16 Cox C. C. 245. * * * Nor is it the case of burglar's tools *or other proofs of guilt* found upon his arrest *within the control of the accused.* (Italics ours.)

So also in *Carroll* v. *United States,* 267 U. S. 132, 158:

> When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him

> to have and *which may be used to prove the offense* may be seized and held as evidence in the prosecution. *Weeks* v. *United States*, 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245; *Getchell* v. *Page*, 103 Me. 387; *Kneeland* v. *Connally*, 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. (Italics ours.)

In *Agnello* v. *United States*, 269 U. S. 20, Government agents arrested Agnello and others in the act of selling narcotics illegally, searched the persons of those arrested, and took packages of narcotics found on the table in the room where the sale was made, which was the home of Alba, one of the prisoners. The officers also searched Agnello's room, several blocks away. This Court held that the admission of the evidence obtained upon the search of Agnello's room in a prosecution against him was reversible error. It said (30, 32, 33):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and *to search the place where the arrest is made* in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is

not questioned. *Such searches and seizures naturally and usually appertain to and attend such arrests.*

* * * * *

While the question has never been directly decided by this court, it has always been assumed that one's house can not lawfully be searched without a search warrant, *except as an incident to a lawful arrest therein.* * * * *Save in certain cases as incident to arrest,* there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. (Italics ours.)

See also *United States* v. *Lee,* 274 U. S. 559, 563.

In *Marron* v. *United States,* 275 U. S. 192, prohibition officers possessing a warrant to search for and seize intoxicating liquors and articles for their manufacture found one Birdsall in charge of the described premises. Intoxicating liquors were being unlawfully sold at the time. The officers arrested Birdsall and searched the place. They found and seized quantities of intoxicating liquor, a ledger showing transactions relating to the business, and a number of bills for gas, electric light, water, and telephone service furnished the premises. It was urged that the seizure of the ledger and bills was illegal because those articles were neither described in the warrant nor on Birdsall's person when arrested. The Government contended that the seizure was justifiable either as an

incident to the execution of the search warrant or as incident to the arrest. The first contention was denied on the ground that under a search warrant only such articles may be seized as are particularly described. As to the second contention the Court said (pp. 198–199):

> When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States, supra,* 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors, and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers* v. *United States,* 2 F. (2d) 146; *Kir-*

vin v. *United States, supra; United States* v. *Kirschenblatt, supra.* The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

Thus there is a substantial body of authority in this Court upholding the privilege of an arresting officer to search for and seize evidence of the crime for which the arrest is made, as indicated in the *Weeks* and *Carroll* cases, *supra,* and the means or instrumentalities used in its commission, as held in the *Agnello* and *Marron* cases, *supra;* and the privilege extends "to all parts of the premises used for the unlawful purpose." In the *Marron* case the premises searched consisted of an entire second floor of six or seven rooms; in the present case, a business office room, about ten by twenty feet, divided by a partition, which "constituted but single premises." (R. 44.) Hence the books and papers here seized as an incident of a lawful arrest were, in so far as they were means used in furthering the conspiracy for which the arrest was made, properly taken, unless the present case comes within the recent pronouncement by this Court in *Go-Bart Co.* v. *United States,* 282 U. S. 344.

In that case prohibition officers possessing an invalid warrant for the arrest of Gowen and Bartels arrested them for the felony of conspiring to violate the National Prohibition Act, falsely represented that they had a search warrant, made a thorough search of the premises, and seized papers and documents. Proceedings were brought to secure the return of the seized articles and for the suppression of their use as evidence. The Government conceded that the warrant was invalid, but contended that the arrests for felony were lawful without a warrant, and that the officers had the right, incident to the arrest, to search the premises for the means used to commit the crime.

This Court expressly assumed that the arrests were lawful. It held, however, that the search was invalid because unreasonable within the meaning of the Fourth Amendment, saying (pp. 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's

office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases, and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

We submit that the search in the present case comes within the rule held to govern in the *Marron*

case and is lacking in those factors the sum of which was regarded by this Court in the *Go-Bart* case as rendering the search there involved unreasonable:

1. When Agent Olivera entered Room 604 on the afternoon of the arrest, crime was being committed in his presence. Under the National Prohibition Act it is a crime to solicit or receive orders for liquor or give information of how liquor may be obtained. *Supra,* p. 2. The complaint charged a conspiracy to violate this provision of the Act. (R. 37.) In view of Olivera's previous dealings with Lefkowitz in Room 604 and of his appointment to meet him there at about the time of the arrests to discuss the sale of liquor and of the fact that Lefkowitz showed by his greeting that he was expecting Olivera, it seems clear that, as the District Court held (R. 44), "The offense charged in the complaint was actually in progress and was being participated in by both petitioners, in room 604, at the time they were arrested." In this respect, therefore, the instant case falls with *Marron* v. *United States* and *Dillon* v. *O'Brien and Davis,* both *supra,* and not with the *Go-Bart* case.

2. The record in the present case shows that the felonious conspiracy was still on foot when the search was made. Not only was Lefkowitz engaged in carrying on the illegal business which was the object of the conspiracy at the time of the arrest, but Agent Olivera had had a telephone conversation with the conspirator Pauline Paris only

three days before the search, in which she had declared that she was authorized to take orders for liquor and had inquired whether the liquor previously sent by Lefkowitz to Olivera was good. She then said Olivera could talk to Lefkowitz's partner to make an appointment with Lefkowitz; and the appointment for the day of the arrest was made in the conversation which followed. In the *Go-Bart* case, so far as the officers knew, there was no evidence that the conspiracy was on foot within six months of the arrest and search. Thus the cases are totally unlike in this respect also.

3. The officers in the present case did not fraudulently claim to have a search warrant, as they did in the *Go-Bart* case, nor did they use threats of force to compel the unlocking of desks and safes. The articles seized were taken from unlocked desk drawers, one of which was open, waste paper baskets, and an unlocked towel cabinet. On the ground that in the present case there was neither fraud nor threats of force to gain access to locked receptacles Judge Swan, dissenting in the court below, thought the *Go-Bart* case distinguishable from the present one (R. 61); and this Court in the *Go-Bart* case stated as one of the grounds of distinction between that case and *Marron* v. *United States* the fact that there was no threat of force in the latter. *Supra*, p. 31.

4. The officers in the present case had a valid warrant of arrest, *supra*, p. 17. They did not in the *Go-Bart* case.

In two respects the present and the *Go-Bart* cases are alike. Here, as there, the officers possessed no search warrant, and the search they made was a general search of the premises,[5] a small room where the respondents were carrying on their illegal liquor traffic. In denying validity of the search upon the latter ground alone, the Court below limited the right of search incident to lawful arrest to things known to be in the possession or under the control of the accused before the arrest is made, and the right of seizure to things found on the person of the accused or openly displayed to view. But the instruments of crime are not known to the officers before the search is made, and the courts have heretofore placed no such limitation upon the search which the arresting officers may make of the premises under the immediate control of the accused. Practically all courts, including this Court in a decision as recent as *Marron* v. *United States,* have held that the privilege of search without warrant by the arresting officer extends to such premises

[5] The latter ground was the *ratio decidendi* of the majority in the court below. Chase, J., said (R. 59): "* * * what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light."

as are under the control of the one arrested. The decision of the court below runs counter to this well-settled rule. The *Go-Bart* case is said to have the same result, but the opposite inference is to be drawn from the care with which this Court, prefacing its discussion of the reasonableness of the search in that case, limited its holding to the specific facts then before it. See quotation *supra*, p. 30. It certainly can not be the law that arresting officers must have a search warrant in *all* cases in order to seize the means used in committing the crime which are found within the possession or control of the prisoner. This we submit would be the effect of the decision of the court below, except in so far as articles found on the person or plainly exposed to view are concerned.

Nor, we submit, was the search conducted by the officers in the present case a "general exploratory search" of the kind which the framers of the Constitution intended to prohibit by the Fourth Amendment. As this Court said in *Carroll* v. *United States, supra,* 267 U. S. 132, 149:

> The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

This Court has frequently pointed out that the abuse aimed at in the Fourth Amendment was the practice of making general searches *under general*

warrants issued without probable cause. That was the type of search condemned in *Entick* v. *Carrington.* That was the type of search, conducted in the colonies under writs of assistance, denounced by James Otis. That was the type of search which the framers of the Fourth Amendment must have had in mind. *Boyd* v. *United States, supra,* 116 U. S. 616, 624–627, 630; *Weeks* v. *United States, supra,* 232 U. S. 383, 390; *Marron* v. *United States, supra,* 275 U. S. 192, 195; Wigmore, Evidence (2d ed.), Sec. 2264.

The obnoxious element in such searches was the authority to make any search of place or person without any showing of probable cause for belief either that a crime had been committed for which an arrest might lawfully be made or that contraband was unlawfully possessed. It was the general authority to make any such search, not the reasonable but thorough search which might be made as an incident to a lawful arrest or under a valid search warrant, which was considered an intolerable abuse of authority. And so it is a confusion of terms to describe the search in this case as a "general exploratory search" such as is within the condemnation of the Fourth Amendment. The question mainly discussed by the court in *Entick* v. *Carrington* was the power of the Secretary of State to issue general search warrants (see quotations in *Boyd* v. *United States, supra,* 116 U. S. 616, 627–629), and the court concluded (19 How. St. Tr. 1029, 1074):

> * * * upon the whole we are all of the opinion that the *warrant* to seize and carry away the party's papers in the case of a seditious libel is illegal and void. (Italics ours.)

In *Weeks* v. *United States, supra,* 232 U. S. 383, this Court said, speaking of the practice of making searches and seizures under general warrants (p. 390):

> Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any *general authority* to search and seize his goods and papers. (Italics ours.)

See also the quotation from *Dillon* v. *O'Brien and Davis, supra,* pp. 22–24.

The language of the Fourth Amendment is apt to accomplish the result desired. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

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[6] The Amendment does not consist of two sentences with a break after the word "violated." It is all one sentence, and the provision that no warrants shall issue except upon probable cause illustrates what is meant by the provision that the right of the people to be free of unreasonable searches and seizures shall not be violated. "The term 'unreasonable' in the constitutions of the States [identical with the Fourth

As this Court said in *Marron* v. *United States, supra,* 275 U. S. 192, 196:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

The court in *Entick* v. *Carrington* was not dealing with a search incidental to a lawful arrest. See *Dillon* v. *O'Brien and Davis*, quoted *supra,* p. 24. Such a search is totally different from the type of search aimed at by the Fourth Amendment. Cf. *Banks* v. *Farwell, supra,* 21 Pick. (Mass.) 156, 159; *North* v. *People, supra,* 139 Ill. 81, 107. In the one case officers are authorized, by documents issued without any probable cause for belief that a crime has been committed, to make a general search of a man's personal effects in the hope that evi-

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Amendment] has allusion to what had been practiced before our revolution, and especially, to general search warrants, in which the person, place, or thing was not described." *Santo* v. *State*, 2 Ia. 165, 215 (1855). "What is meant by 'unreasonable searches and seizures' is clearly explained by the subsequent words in both Constitutions [Federal and State.]" *Banks* v. *Farwell, supra*, 21 Pick. 156, 159 (Mass. 1839). That this was the intention of the framers of the Constitution clearly appears from the contemporary statements of the proposition now embodied in the Fourth Amendment, which are to be found in the State Constitutions and the Amendments proposed by the States, and from the legislative history of the Fourth Amendment. These are set forth in Appendix B, *infra*, pp. 47–52.

dence of the commission of *some* crime may be obtained. Their entry is unlawful. In the other, officers are authorized to make an entry into a man's premises because there is probable ground for belief that he has committed a crime. Their entry is lawful. Being rightfully upon the premises (and in the present case, finding the man engaged in the commission of the crime for which the warrant of arrest issued) they are authorized, contemporaneously with the arrest, to make a search for the means used in committing the *particular crime* and for evidence to prove its commission. We submit that, having this privilege, it was not only the right of the officers, but it was their duty to make a thorough search of the premises under the control of the accused for the instrumentalities of the crime. See *Getchell* v. *Page, supra,* 103 Me. 387, 391; *Smith* v. *Jerome, supra,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Stubler,* 84 Pa. Super. Ct. 32, 35; *State* v. *Magnano,* 97 Conn. 543, 545; *Banks* v. *Farwell,* supra, 21 Pick. (Mass.) 156, 159; *State* v. *Robbins,* 124 Ind. 308, 311. The indefeasible right of the individual to be secure in his person and effects yields to the public interest in expediting the prosecution of one reasonably believed to be guilty of a criminal offense. See quotation from *Dillon* v. *O'Brien and Davis, supra,* pp. 22–24.

The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest.

As held by this Court in *Marron* v. *United States, supra,* 275 U. S. 192, nothing can be searched for and seized under a search warrant except that which is specifically described in it, whereas upon a lawful arrest the arresting officers have the right to search for and seize *any* articles used in the commission of the offense for which the arrest is made. A search of the latter sort is necessarily general in the sense that it is for things the existence of which can not be known until they are found. In the *Marron* case the officers were not aware of the existence of the ledger until they found it in the closet. The fact that they were not searching for definite and specific articles used in the commission of the crime was not regarded by this Court as rendering the search objectionable as a general exploratory search for evidence. See also *Dillon* v. *O'Brien and Davis, supra,* 16 Cox. C. C. 245. Searches "general" in this sense as well as in their scope have been upheld by the State courts as incidents of lawful arrests. *Argetakis* v. *State, supra,* 24 Ariz. 599, 604; *Pickett* v. *Marcucci's Liquors, supra,* 112 Conn. 169; *Com.* v. *Phillips, supra,* 224 Ky. 117; *Smith* v. *Jerome, supra,* 47 Misc. (Sup. Ct. N. Y.) 22; *Com.* v. *Stubler, supra,* 84 Pa. Super. Ct. 32. See also *Dillon* v. *O'Brien and Davis, supra,* 16 Cox C. C. 245; *Carmichael* v. *McCowen, supra,* (1897–1903) Newfoundland 587.

In the brief in opposition to the petition for certiorari respondents argue (pp. 26–28) that the

papers seized in this case were not means used in committing crime but mere evidence of the commission of crime. This contention is difficult to reconcile with *Marron* v. *United States*. In that case this Court held, in language quoted *supra*, pp. 28–29, that the ledger showing transactions relating to the business and the various bills for gas, electric light, water, and telephone service were means used to commit crime within the rule permitting search and seizure pursuant to lawful arrest. The fact that such articles may furnish documentary proof of guilt does not, we submit, render the search unreasonable. The contrary is the effect of the decision in the *Marron* case and of many of the other numerous decisions in which searches and seizures incident to arrest have been sustained.

The District Court below examined those seized papers which had not been returned and found none whose retention he regarded as unlawful within the authorities. (R. 44, 45.) Judge Swan, in his dissenting opinion in the Circuit Court of Appeals (R. 60), said that Items 2, 3, 4, and 10 (R. 24) "do not appear to have any relation to the crime with which Lefkowitz was charged." He considered the other items (R. 24, 25, 35), which were apparently used in connection with the illegal conspiracy, to have been validly seized. The majority opinion did not discuss this question. The Government does not contend that items which appear to have no relation to the crime should not be returned. It

does contend, however, that most of the articles here seized were "things used to carry on the criminal enterprise" within the rule of *Marron* v. *United States*, and that the court below erred in directing that the use of these articles as evidence be suppressed. The articles are listed, with references to the record, in Appendix A, *infra*, pp. 45–47.

Respondents also argue in the brief in opposition to the petition for certiorari (p. 27) that the arresting officers in the present case did not know at the time of the seizure whether the documents were means used to commit crime, and that the position of Judge Swan that only articles unrelated to the crime should be returned is at variance with constitutional principles in making the validity of the seizure depend on what is seized. But the situation was the same in the *Marron* case. The officers there did not know whether the ledger they had seized was a means used in committing crime until they had opened it and examined its contents, nor whether the bills were until each had been scrutinized.

We submit that the search in this case comes within the rule held to govern in the *Marron* case, and is lacking in those factors the sum of which was regarded in the *Go-Bart* case as rendering unreasonable the search there involved. Under the construction of the latter decision by the court below, practically nothing is left of the rule that a search may be made as incident to a lawful arrest.

CONCLUSION

The judgment of the Circuit Court of Appeals was erroneous. It should therefore be reversed.

Respectfully submitted.

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APPENDIX A

The articles taken by the prohibition agents during their search of Room 604 are listed in the affidavits of Agents Delmore and Guilfoyle. The following articles were taken from the desk in the outer office (R. 24):

1. Black leather covered loose leaf notebook, containing alphabetical list of names and addresses.

2. An envelope marked room 604, 1547 Broadway, New York City, containing a 1929 New York State motor vehicle registration certificate 5 Y–2555, issued to Milton Hordish, 635 Kelly Street, Bronx, N. Y., for a 1929 Nash sedan.

3. A bill or statement amounting to $25 addressed to Herman Bernstein, c/o Bernstein & Lefkowitz, 1547 Broadway, New York City, apparently sent by doctors whose names appear on the statement.

4. Business card bearing the name of Dave Scherl, giving his address and telephone number and residence telephone number.

5. A number of business cards reading as follows:

Dan Lefkowitz Herman Bernstein
LEFKOWITZ & BERNSTEIN
1547 Broadway
New York City
Chickering 4–8928 Room 604

6. About 25 sheets of typewriter paper with the heading thereon of "William Salmon, 1547 Broadway, room 604."

7. About 75 envelopes addressed to various persons throughout the United States,

some of which contained undated letters bearing the typewritten signature "William Salmon" to the effect that he had made his yearly change of name from "Henry Miller" to "William Salmon" and that he had received a new stock of merchandise that was for sale.

8. A cardboard covered loose leaf binder, containing an alphabetical typewritten list of names and addresses.

9. A stenographer's notebook and textbook.

10. Three raffle books.

From the desk in the inner office Agent Olivera took a bottle partly full of alcohol; a telephone address book containing names of persons and telephone numbers; a business card; a blank order book with some of the slips torn out; and several business cards of Bernstein & Lefkowitz. (R. 35.)

From the two wastepaper baskets torn scraps of paper were taken which, when pasted together, formed the following (R. 35):

Edison Company electric light bill from October 31 to December 3, 1930, for room 604, at 1547 Broadway, reading No. 6223; bill addressed to Herman Bernstein at 1547 Broadway.

Edison Company electric light bill from December 3, 1930, to January 5, 1931, for room 604, at 1547 Broadway, reading No. 6248; bill addressed to Herman Bernstein at 1547 Broadway.

Unsigned letter from Lefkowitz & Bernstein, 1547 Broadway, to L. Lieberman, 34 E. 12th Street, New York City, for merchandise delivered, $80.

Some 32-odd salesmen's order slips for intoxicating liquor with customers' names and addresses.

N. Y. Telephone Co. receipt No. 6225 dated January 8, 1931, acknowledging having received from Daniel Lefkowitz sum of $14.26 for telephone service, Chic. 4–8928.

A pencil memorandum containing some 35 names with amounts set after the respective names, some of these names being Myers, Gordon, French, and K.

A pencil memorandum containing names with amounts set after the names, one of them being Dan, $537, the total amount of the memorandum being $1,497.95.

From the towel cabinet the agents took several typewritten loose-leaf sheets unbound, bearing names and addresses of numerous people throughout the United States. (R. 25.)

APPENDIX B

EARLY STATE CONSTITUTIONS

Article 10 of the Bill of Rights of Virginia (1776) provided (7 Thorpe, American Charters, p. 3814):

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Article 23 of the Declaration of Rights of Maryland (1776) provided (3 Thorpe, *supra*, p. 1688):

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants—to search suspected places, or to apprehend

> suspected persons, without naming or describing the place, or the person in special—are illegal, and ought not to be granted.

Article 11 of the Declaration of Rights of North Carolina (1776) was substantially identical with the Virginia provision, *supra*. See 5 Thorpe, *supra*, p. 2788.

Article 10 of the Declaration of Rights of Pennsylvania (1776) provided (5 Thorpe, *supra*, p. 3083):

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Article 11 of the Declaration of Rights of Vermont (1777) was substantially identical with the Pennsylvania provision, *supra*. See 6 Thorpe, *supra*, p. 3741.

Article 14 of the Declaration of Rights of Massachusetts (1780) provided (3 Thorpe, *supra*, p. 1891):

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one

> or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Article 19 of the Bill of Rights of New Hampshire (1784) was substantially identical with that of Massachusetts, *supra*. See 4 Thorpe, *supra*, p. 2456.

FORMS OF THE AMENDMENT PROPOSED BY THE STATES

The 14th clause of the Declaration of Rights proposed by Virginia in ratifying the Federal Constitution (1788) provided (Madison, Debates in the Federal Convention [International Ed. 1920], p. 661):

> That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and his property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

In ratifying the Federal Constitution (1788), New York declared (Madison, *supra*, p. 667):

> That every Freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his prop-

> erty, and therefore, that all Warrants to search suspected places or seize any Freeman, his papers, or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

The 14th article of the Declaration of Rights proposed by North Carolina in ratifying the Federal Constitution (1789) was substantially identical with the Virginia proposal, *supra*. See Madison, *supra*, p. 676.

In ratifying the Federal Constitution (1790), Rhode Island made a declaration substantially identical with that of New York, *supra*. See Madison, *supra*, p. 682.

PROCEEDINGS IN CONGRESS

As presented to the House of Representatives of the First Congress by Madison, the Fourth Amendment read (1 Gales, Annals of Congress, pp. 434–435):

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

The following took place at the meeting of the Committee of the Whole House on Amendments (Gales, *supra*, p. 754):

> The committee went on to the consideration of the seventh clause of the fourth

proposition, being as follows: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized."

Mr. GERRY said he presumed there was a mistake in the wording of this clause; it ought to be "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches," and therefore moved that amendment.

This was adopted by the committee.

MR. BENSON *objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."*

The question was put on this motion, and lost by a considerable majority.

Mr. LIVERMORE objected to the words "and not" between "affirmation" and "particularly." He moved to strike them out, in order to make it an affirmative proposition.

But the motion passed in the negative.

The clause as amended being now agreed to * * *. (Italics ours.)

The Amendment in this form was adopted by the House a few days later. Gales, *supra*, p. 767.

The report of the proceedings in the Senate is scanty, since it sat behind closed doors. 1 Gales, *supra*, p. 16. After some debate (1 Gales, *supra*, pp. 74, 75, 76), some of the proposals of the House were agreed to and some were not, and the House

was notified. (Gales, *supra*, pp. 77, 889.) Apparently the Senate made some proposals itself, since it is reported that the House took into consideration the Amendments to the Constitution as amended by the Senate (1 Gales, *supra*, p. 903), agreed to some and disagreed to others (1 Gales, *supra*, p. 905), and asked for a conference on those disagreed to (1 Gales, *supra*, p. 83). The Conference Committee's recommendations were followed by the House (1 Gales, *supra*, p. 913) and the Senate (Gales, *supra*, p. 88), and the proposed forms of amendment were then ordered sent to the President (1 Gales, *supra*, pp. 913–914).

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